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RUEHLP/AMEMBASSY LA PAZ FEB SANTIAGO 0213
RUEHCV/AMEMBASSY CARACAS 9102
RUEHBU/AMEMBASSY BUENOS AIRES 2269
RUEHME/AMEMBASSY MEXICO 3281
RUEHBR/AMEMBASSY BRASILIA 6520
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DEPT FOR WHA/AND, WHA/CEN, EB/IPE CLACROSSE AND AANDAMO
COMMERCE FOR 4331/MAC/WH/MCAMERON
DOC FOR JBOGER
USPTO FOR JURBAN
LOC FOR STEPP
USTR FOR JCHOE-GROVES

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TAGS: [ECON](#) [ETRD](#) [KIPR](#) [PE](#)
SUBJECT: PERU: SPECIAL 301 REVIEW

REF: A) STATE 14937 B) 05 LIMA 1971 C)05 LIMA 3794

11. Summary. Post recommends that Peru remain on USTR's Special 301 Watch List for 2006. Peru continued to face high levels of copyright piracy in all sectors, including media, books, toys, apparel and other merchandise, in 2005, including a slight increase in optical disc piracy. Indecopi, the GOP's IPR administrative agency, conducted high-profile raids and continued its public awareness campaign. Peru continues to face several problems, including the overall inadequacy of enforcement, inadequate border protections and the lack of deterrent sentences. The GOP, in concluding Free Trade Agreement negotiations with the United States in December 2005, obligated itself to protecting proprietary test data for pharmaceutical and agrochemical products beginning in January 2007. End Summary.

Peru's International Obligations

12. Peru is a member of the World Intellectual Property Organization (WIPO). It is also a member of the Paris Convention, Berne Convention, Rome Convention, Geneva Phonograms Convention, Brussels Satellites Convention, Universal Copyright Convention, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Peru's 1996 Copyright Law is generally consistent with the TRIPS Agreement. Peru joined the WCT in July 2001 and the WPPT in February 2002. Although most of the provisions of these two WIPO treaties are included in Peru's 1996 Copyright Law, officials at Indecopi, the IPR administrative agency, have acknowledged the need for additional legislation in order to clarify the rights of artists and producers. The National Association of Music Publishers continues to criticize Indecopi's enforcement, claiming that its members are not receiving the royalties due to them. Peru's 1996 Industrial Property Rights Law provides the framework for patent protection. In 1997, based on an agreement reached with the U.S. Government, Peru addressed several inconsistencies with the WTO TRIPS Agreement provisions on patent protection and most-favored

nation treatment for patents.

Efforts to Rein in Piracy Enhances Coordination

13. Indecopi continued its "Anti-Piracy Crusade," which began in 2002. Indecopi's anti-piracy efforts in 2005, in collaboration with other government agencies as well as the private sector, focused on: 1) intensifying enforcement actions and 2) expanding the public awareness campaign. In March and November, the Anti-Piracy Crusade organized "Anti-piracy Day" and "Movie Theater Day", in an effort to increase public awareness about intellectual property rights. On both days, Peruvian movie theaters offered discounts on movie tickets prices, promoting increased attendance. Moviegoers were encouraged to turn in pirated DVDs in exchange for discounts on food and future movie ticket sales. On both days, the Anti-Piracy Crusade collected more than 80,000 pirated DVDs.

14. Indecopi's copyright office conducted, jointly with the national police and SUNAT (Peru's tax and customs agency), more than 60 raids in 2005, with 13 occurring outside of Lima. Indecopi and SUNAT confiscated more than \$30 million in pirated and contraband goods and blank optical discs. In July 2005, the Peruvian police, coordinating with one of Peru's special IPR prosecutors, successfully raided "El Hueco", a market known for selling pirated products in Lima, and confiscated 8 tons of contraband and pirated merchandise worth \$300,000.

15. In September 2005, SUNAT and Indecopi signed a Memorandum of Understanding, enabling Indecopi to assign one officer to the Port of Callao. This officer works closely with Customs to review incoming shipments. In six months, Indecopi and SUNAT screened 51 containers and confiscated the contents of 18 containers that were illegally transporting contraband and pirated goods. Private sector and Indecopi officials agree that this is a step in the right direction, although they believe that SUNAT, which assumed control of Peruvian customs operations in 2003, must become more involved in overall IPR enforcement. Many customs officials have had little or no prior training on how to recognize counterfeit goods.

16. In October 2005, Post, the U.S. Patent and Trade Office, and U.S. Customs conducted an IPR training seminar for Customs and Indecopi officials. U.S. Customs officials advised the Peruvian participants on obligations under TRIPS and best practices for finding and seizing contraband and pirated goods. One issue highlighted by the conference was the need for Peru to meet its TRIPS obligations; many Customs officials were unaware of TRIPS and how the agreement affects how they do their job.

High Rates of Optical Disc Piracy

17. Despite Indecopi's efforts (detailed below), copyright piracy rates remained the same in 2005. The audiovisual industry suffered from the piracy of optical discs, with an estimated piracy level of almost 75 percent, up from 65 percent in 2003. Jose Vega, General Manager of Blockbuster Peru, informed us that the motion picture industry lost an estimated \$5 million in 2005 due to audiovisual piracy. The large amount of imported blank optical discs, as well as the wide availability of DVD technology, helps account for this increase. Peru also has one of the highest rates of musical piracy in the world. According to the Anti-Piracy Crusade, 98 percent of CDs in Peru are pirated. Martin Moscoso, head of Indecopi's copyright office, and the Business Software Alliance noted that business software piracy levels remained the same since 2004, at approximately 54 percent.

Formal Importation of Blank Discs Decreases But Contraband on the Rise

¶8. Indecopi estimates that in 2005, approximately 100 million blank optical discs were legally imported into Peru, a decrease of 10 million since 2004. Indecopi approximates that of these 105 million discs, only 14 million were used for legal purposes. Martin Moscoso, Director of Indecopi's Copyright Office, explained that, due to the high private copy levies (approximately 200-300 percent of costs) imposed by the Peruvian Artists Association in 2005, formal importers of blank optical discs chose to reduce imports in order to avoid paying such a high fee. Moscoso also indicated that contraband of blank optical discs has increased, although official figures are unavailable.

SUNAT Implements Registry

¶9. In July 2004, the GOP passed a law requiring that SUNAT establish an import registry for all persons and companies importing blank optical discs and recording equipment. With the registry, SUNAT would be able to monitor the frequency of optical disc importation and target those companies that cannot justify legal sales of these discs. On September 25, 2005, SUNAT published regulation 020-2005, which established the norms for the import registry. Importers of blank optical discs must provide SUNAT with the number of units imported, the name of the commercial organization that will sell the discs, the commercial brand of the discs, the model information and format characteristics.

¶10. The registry went into effect on October 24, 2005. According to SUNAT officials, legitimate importers of blank optical discs have faced no difficulty in providing SUNAT with the necessary information. However, importers that either use the discs for illicit means or sell them to illegitimate vendors have been more reluctant to provide SUNAT with the information. SUNAT officials predict that the level of legal imports of blank optical discs will decrease in 2006, as more discs are smuggled across land borders. SUNAT plans on improving its border protections to crack down on the contraband of blank discs.

New Regulations to Strengthen IPR Enforcement

¶11. The GOP in 2005 passed several new regulations aimed at improving the IPR environment. On October 28, SUNAT, coordinating closely with Indecopi and the private sector, issued a resolution modifying the January 2004 decree that required importers of blank CDS to make valued added tax payments in advance. The new regulation seeks to improve SUNAT's ability to trace imports of blank discs and their subsequent purchases. SUNAT now charges an advance VAT of \$0.03 per CD and \$0.06 per DVD. Under the regulation, SUNAT is now able to audit importers' sales to determine the legitimacy of the sale and who are the largest consumers of blank optical discs. If a company feels that it has paid too much in VAT, it must provide SUNAT with evidence of its sales. SUNAT would then issue a credit for future VAT payments.

¶12. The Lima Municipality in October 2005 issued Order 717 to improve the ability of police to raid local vendors of pirated products. The regulation now enables the Municipal Government, working with the police, to revoke licenses for those vendors who sell pirated products. The Anti-Piracy Crusade lauded the new regulation, but commented that the Lima Government has yet to enforce it. Indecopi continues to work with the Lima Municipality, as well as several other municipal governments, to encourage the protection of intellectual property.

Amendment to the Artists Protection Law Pending

¶13. In July 2004, the Prime Minister approved a Supreme Decree establishing the Law of Artists, Interpreters and Music to protect the interests and rights of those involved

in the creative arts, including performers and producers of musical recordings and motion pictures, from acts of piracy. The decree argued that blank optical media was being used for "private copies" and piracy of media and software, violating copyright laws. Under the law, the Peruvian Artists Association can apply a levy of 200-300 percent on all blank optical discs, to be paid by the manufacturers of blank recording media.

¶14. The private sector, working with Indecopi, the Lima Chamber of Commerce, and the Peruvian Artists Association, sought to have the levy reduced to a more reasonable 20 percent of the value. A recommendation was passed to the Ministry of Trade in early January 2006 for action. If the Ministry of Trade agrees with the recommendation, it will pass the document to the Prime Minister's office for a Supreme Decree.

Still No Convictions of IPR Violators

¶15. Industry and Indecopi officials agree that the GOP needs to improve IPR enforcement. Both call for the establishment of specialized judges to handle IPR cases, as well as greater authority for the two special IPR prosecutors (who only have authority in Lima). Currently, judges lack expertise in intellectual property matters and have avoided imposing harsh sentences on IPR violators. In July 2004, the GOP passed Law No. 28289, the Law on the Fight Against Piracy, which increased the minimum penalty for piracy from a two-year to a four-year sentence, with a maximum sentence of eight years. There have yet to be any convictions under the new law, although there are more than 1,000 intellectual property cases pending before Peru's courts.

¶16. In mid-2005, Indecopi filed a lawsuit for piracy and money laundering against one of the main optical disc importers. The case remains in the Judiciary, and the importer has filed a countersuit against the Indecopi officials for slander and wrongful prosecution. Martin Moscoso lamented that the Peruvian Judicial system is inherently slow and corrupt -- this case could take several years to resolve.

Deadline Extended for Legal Software Use

¶17. In 2003, the GOP passed a decree mandating that all government agencies use legally procured open-source software. GOP agencies had until March 31, 2005 to erase all pirated software and install the legitimate versions. The E-Government Office in the Prime Minister's Office in late 2004 took the lead in implementing this project. In mid-2005, Rafael Muentes, the new Director of the E-Government Office, conducted an audit of the software used by GOP agencies. He found that only 60 percent of GOP agencies were following the decree. In November 2005, the GOP issued a regulation extending the deadline for installation of legal software to December 31, 2006.

Increased Problems with Lack of Patent Protections for Pharmaceuticals

¶18. In 2005, three U.S. pharmaceutical companies complained that Indecopi was not adequately protecting patents. In all three cases, the companies noted that they face unfair competition from local distributors selling foreign-made pirated copies of their best selling products. While Indecopi initially issued a precautionary measure against the local producers, this measure, per Peruvian law, expires after 120 days. In several cases, Indecopi ordered the U.S. companies to prove that the local distributors are selling pirated copies of their patented medicines, which is contrary to TRIPS obligations. This process takes time and substantial funding, during which the company can still sell the pirated product on the market. Even if Indecopi orders

a local distributor to cease sales of the allegedly pirated product, the distributor can appeal the decision; during the appeals process, local producers can resume sales of the "pirated" product. The companies estimate that they have lost more than \$5 million in damages due to lost government procurement sales.

Pharmaceutical Data Protection

¶19. The U.S. pharmaceutical and agrochemical industries also continue to be concerned about Peru's protection of confidential test data. Peruvian government health

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authorities approved the commercialization of new drugs that were the bioequivalents of already approved drugs, thereby denying the originator companies the exclusive use of their data. In effect, the Government of Peru allows the test data of registered drugs from some companies to be used by others seeking approval for their own pirate version of the same product. U.S. companies also are concerned that the Peruvian government does not provide patent protection for second uses, which would allow a company with a patented compound for one use to subsequently patent a second use of that compound. Although Peruvian law provides the means for effective trademark protection, counterfeiting of trademarks and imports of counterfeit merchandise remain widespread.

¶20. While Indecopi did not take significant action in 2005 to improve the protection of confidential pharmaceutical data, the GOP did conclude negotiations on a bilateral free trade agreement with the United States. In doing so, the GOP committed itself to protecting proprietary test data for pharmaceutical and agrochemicals for ten years. The free trade agreement, once signed and ratified by the U.S. and Peruvian Congresses, is scheduled to go into effect on January 1, 2007.

2006 Training Plans

¶21. In 2006, Post, working with the U.S. Patent and Trade Office and the Department of Homeland Security, plans on hosting several training classes in Peru for key IPR and law enforcement officials. In February 2006, the International Law Enforcement Academy (ILEA) in Peru, with assistance from the U.S. Customs and Border Protection, hosted a training seminar for 50 officials from Peru, Brazil, Argentina and Paraguay. During the seminar, officials learned new techniques for investigations and seizures, how to prepare a case report for pending prosecutions, and best practices from U.S. Customs.

¶22. Post in 2005 submitted to State/INL a request for funding for an IPR training seminar for Peru's special IPR prosecutors, police and judges. To date, Post has not received an answer from State/INL on its proposal. If money is not available from State/INL, Post will seek funding from alternate sources, such as the U.S. Patent and Trade Office and the private sector.

¶23. Post also plans on sending several Indecopi Officials to the United States for an international visitors IPR program. Additionally, we would like to work with the U.S. Patent and Trade Office to host a conference on Peru's obligations under TRIPS and the U.S.-Peru Free Trade Agreement.

Comment: Recommend No Change in Status

¶24. Post recommends that Peru remain on USTR's Special 301 Watch List due to the continued high levels of piracy and copyright violations, as well as the continued lack of protection for pharmaceutical test data. Despite increased focus and awareness of IPR problems, the GOP has not increased judicial enforcement of existing laws in order to

create a meaningful deterrent or established clear administrative measures for government agencies to comply with those laws.

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